Satellite Services, Network Licensing and the Broadcasting Act

A Research Study for the
Task Force on Broadcasting Policy

March 31, 1986

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Introduction

This study was carried out at the request of the Task Force on Broadcasting Policy in the period December 1985 to March 1986. It responds to a request for a review of the definition of the term "network" in the Broadcasting Act, and in particular whether that term should be clarified so that it would clearly apply to all specialty and pay networks operating in Canada, regardless of their mode of operation, and whether or not the signals are scrambled. A related issue upon which assistance was sought was the use of network licensing as a mechanism whereby U.S. satellite services carried in Canada might be supplanted by comparable Canadian services as and when they would be licensed by the CRTC as network operations.

History of the Definitions

One of the first things that warrants attention in any review of the language of the Broadcasting Act, is the continued usefulness or appropriateness of the definitions of the terms "broadcasting" and "network".

Prior to 1968, the term "broadcasting" was defined in the Broadcasting Act as follows:

> "broadcasting" means the dissemination of any form of radioelectric communication, including radiotelegraph, radiotelephone, the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves, intended to be received by the public either directly or through the medium of relay stations.

The reference to "relay stations" at the end of the definition is very similar to the language of the definition of "broadcasting" in the U.S. Communications Act of 1934, which continues to read as follows:

> "broadcasting" means the dissemination of radiocommunications intended to be received by the public, directly or by the intermediary of relay stations.

In 1968, with the revision of the Broadcasting Act, the definition of "broadcasting" was changed to reflect the language

of the International Telecommunications Convention. The definition presently reads as follows:

> "broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public.

While the reference to relay stations was dropped, the 1968 Broadcasting Act added a requirement for the first time that "networks" be directly licensed by the regulatory authority. The term "network" was defined as follows:

> "network" includes any operation involving two or more broadcasting undertakings whereby control over all or any part of the programs or program schedules of any of the broadcasting undertakings involved in the operation is delegated to a network operator.

The term "broadcasting undertaking" was also defined for the first time in the 1968 Act, as follows:

> "broadcasting undertaking" includes a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada.

The phrase "located in whole or in part within Canada" has been the subject of a number of Canadian court decisions in the early 1970's. Among other matters, the courts have ruled that a broadcasting undertaking is located in part in Canada even if the cable head-end is located entirely in the United States and the signal is supplied by wire to a separate company in Canada.[1] Nor does the term "undertaking" require the ownership of physical assets; an undertaking can be comprised of an arrangement under which physical assets are used by a number of different persons or companies in a common enterprise. Each of the participants is considered to be carrying on an undertaking located in whole or in part within Canada, for the purposes of CRTC licensing.[2]

By contrast, it is interesting to note that the U.S. Communications Act of 1934 nowhere contains the term "network". It does allow the Federal Communications Commission to enact regulations applicable to radio or television stations engaged in "chain broadcasting", defined to mean "simultaneous broadcasting of an identical program by two or more connected stations". But unlike the situation in Canada, the FCC does not directly license networks; rather it exerts controls over networks by its licensing authority over the individual network stations, or through the

enactment of general regulations applicable to chain broadcasting.

New Developments

The word "undertaking" is the subject of a proposed amendment in Bill C-20, currently before Parliament.[3] Apart from this proposed amendment, however, the definitions referred to above have remained the same for 18 years. During that time, the nature, variety and number of broadcasting services has dramatically changed.

Probably the most obvious change has been in the evolution and development of satellite services, that is, program services distributed by means of geostationary satellites. Beginning with Home Box Office in 1976, a great variety of such services have been inaugurated, directed at cable television head-ends and intended for retransmission to cable subscribers, either as part of a basic enhanced package of services, or on a discretionary basis as a "premium" service.

While these services were intended only for reception by cable head-ends, the reduction in prices in the last few years for satellite dishes, usually referred to as TVRO's or "earth stations", has also made it possible for an increasing number of individual householders, multiple dwellings or other unauthorized locations, to receive the same programming without a contractual relationship with the program supplier and without making payment. The imminent scrambling of the satellite signal of many of these program services has itself created a crisis in the earth station industry, as users are now finding that they will be required to pay for what was formerly considered to be free.

Further developments are on the horizon which could alter the environment for broadcasting in Canada. One such development would be the introduction of Direct Broadcast Satellites (DBS), capable of transmitting a high power program signal directly from the satellite to even cheaper earth stations located in householder premises. The reception by individual householders of the low power signals presently receivable from satellites, although unauthorized, is in effect a precursor of DBS. A medium power DBS service employing Anik C was launched in the northern United States by General Communications Inc. in 1984, but was unable to achieve sufficient penetration to be financially viable. However, further efforts along this line can be anticipated, both in Canada and the United States.

With the advent of scrambling in the United States, many of the existing U.S. satellite services are beginning to authorize the marketing of their services directly to dish owners, through authorized descramblers. Since the movie-based services --

including Home Box Office, Cinemax, Showtime and The Movie Channel -- have not generally acquired Canadian distribution rights for their programs, however, they are unable to market such descramblers in Canada. However, this is a contractual matter which could change in the future.

Added to these developments is the potential arrival of high definition television, which would represent a quantum jump in reception quality, but would require a different satellite frequency band, and a new generation of earth station hardware.

CRTC Licensing Decisions

Since the introduction of these new program services, the CRTC has wrestled with how they should be dealt with under the definitions in the Broadcasting Act.

In a series of decisions in the 1970's, the Commission made the important determination that a network operation need not involve conventional broadcast programs. It can just as easily involve programs which are sent by microwave relay or by satellite and which have not been originated on a conventional broadcasting station. (Generally a network will involve transmission from a single source to a number of cable systems for simultaneous retransmission to subscribers; however, even if there is an automatic delay, the operation can still be considered a network if there is a delegation of control over the programs or program schedules from the affiliate to the network operator.)[4]

The application of the term "network operation" to programs other than those originated by conventional broadcasting stations was first dealt with in the early 1970's, when the Commission granted network licences to operations involving the microwaving of program material for distribution on the cablecast channels of a number of cable systems. In 1979, the Commission applied the same principle to delivery of programs to cable head-ends by satellite and it granted a series of temporary network licences to the Canadian Broadcasting Corporation as a network operator for the Parliamentary Channel.[5]

In 1981, the CTV Television Network was licensed temporarily to provide an interim satellite program service for reception by cable systems and others in remote areas.[6] This was supplanted by the licensing of Canadian Satellite Communications Inc. ("Cancom") later in 1981 as a network operator to provide a program service via satellite to cable systems and/or broadcast retransmitters in remote areas consisting of three English television station signals and a package of French language programs.[7]

Continuing with this approach, the Commission has licensed a large number of satellite programming services since 1981 as "network operations" under the Broadcasting Act. These include the following:

- Atlantic Satellite Network, licensed on April 14, 1981 to provide a television network operation (formerly ATV-2) via satellite to cable distributors in Atlantic Canada.

- First Choice Canadian Communications Corporation, licensed on March 18, 1982 to operate a general interest English language pay television network via satellite; its authorized area was reduced to Eastern Canada in a decision issued on August 16, 1984.

- Allarcom Pay Television, a division of Allarcom Limited, licensed on August 16, 1984 to operate a general interest English language pay television network via satellite in Western Canada. This company represented the merger of the Alberta, Ontario and B.C. Superchannel licences originally granted in 1982 and 1983.

- Premier Choix:TVEC Inc., licensed on January 31, 1984 to operate a general interest French language pay television network via satellite; now called Super Ecran, and authorized for Eastern Canada, it was a merger of Premier Choix and TVEC, two services originally licensed in 1982.

- Much Music, licensed on April 2, 1984 to operate an English language specialty network via satellite offering a music service on a discretionary basis across Canada.

- The Sports Network, licensed on April 2, 1984 to operate an English language specialty network via satellite offering a sports service on a discretionary basis across Canada.

- ACCESS Alberta, licensed on November 15, 1984 to operate an educational program service distributed by satellite to cable systems in Alberta.

- The Life Channel, licensed on March 14, 1985 to operate an English language specialty network offering a health and lifestyle service via satellite on a discretionary basis across Canada.

By treating these services as network operations, warranting a network licence, the Commission was able to hold competitive hearings at which a number of applicants could be considered for licences. In addition, the Commission through its powers under Section 17 of the Act to annex conditions of licence, was able to impose conditions intended to ensure that the programming carried by such services reflected the aims in Section 3 of the Broadcasting Act.

The issue of whether the CRTC can licence the provider of a satellite program service as a network operator under the Act turns on whether the term "programs or program schedules" in the definition of "network" can include programming from a satellite as opposed to programming from a conventional broadcast transmitter. Some have argued that satellite programming is not "intended for direct reception by the general public", since the signal is to go to the public only through the intermediary of the cable systems; thus, under this argument the signal would not technically constitute "broadcasting". However, the Commission has taken the view that nothing turns on whether a satellite signal is itself "broadcasting" in the narrow definition of the Act. The essential question is whether or not it is sending those programs to a broadcasting receiving undertaking, i.e. a cable television system.

This approach to its jurisdiction was upheld in 1982 by the Newfoundland Court of Appeal in R. v. Shellbird Cable Limited, 67 C.P.R. (2d) 148. In this decision, the Chief Justice of Newfoundland, on behalf of a unanimous court, made the following statement:

> "In my view, the total programming carried by a licensed broadcasting undertaking must be governed by its licence to operate, whether or not a given program comes within the definition of broadcasting. To exempt programs which do not fall within the strict definition of broadcasting from regulation by the Commission, would be contrary to the policy of the Act as set out in s. 3 and would ultimately defeat the whole purpose of having a national broadcasting policy for which the statute was enacted."

This ruling has made it clear that the Commission has the power to require cable television systems to obtain CRTC authorization before satellite services can be carried on their systems. By necessary implication, the decision also makes it clear that the CRTC can licence satellite-to-cable program suppliers as network operators, even if the programming does not technically qualify as "broadcasting".

A more recent judgment of the Federal Court of Appeal has reached the conclusion that satellite programming constitutes broadcasting in itself, on the basis that such programs are in fact received by individual householders with earth stations, and therefore satellite program suppliers must be deemed to have intended that their signal be received directly by the general public, unless they scramble the signal.8

In clause 2 of Bill C-20, currently before Parliament for a third reading, the definition "undertaking" in the Broadcasting Act would be expanded so as to embrace any person who within Canada "transmits or distributes by means of telecommunications, otherwise than solely as a telecommunications programming received by radiocommunication". This amendment would clearly extend the ambit of the Broadcasting Act to SMATV systems. However, even in the absence of this amendment, the court rulings have generally upheld the Commission's power to license satellite-to-cable program suppliers as network operators, and to require cable television systems to obtain authorization before such services can be carried.

Entry of Unlicensed Networks

While the Commission has generally obtained satellite-to-cable program suppliers to obtain a network licence, it has refrained from doing so in three cases. In each of these cases, it has decided to allow cable systems in Canada to carry the signals of program suppliers without requiring the program supplier to obtain a network licence.

The first instance of this approach was the "S.E.T.T.E." service, a package of programs originating from three television networks in France, and delivered by the Societe d'Edition et de Transcodage T.E. Ltee via Anik B (now Anik C) to participating cable television operators in the province of Quebec. The CRTC considered and approved the delivery of this service in a number of decisions in 1979 and 1980, and permitted the participating cable systems to increase their basic subscriber fees by varying amounts to cover the costs involved. However, S.E.T.T.E. was not required to obtain a network licence. Instead, the cable systems were simply authorized in separate decisions to carry the service.9

A second instance occurred with the inauguration in 1980 of a satellite-to-cable educational program service on Anik C by the Knowledge Network of the West Communications Authority. This service is retransmitted by cable television systems in communities throughout B.C. but the CRTC has not required a network licence to be obtained. This contrasts with ACCESS Alberta which operates a similar system in Alberta and which obtained a network licence from the CRTC to cover it in 1984.10

(Both Radio-Quebec and TV Ontario also operate under network licences issued by the CRTC but they have not yet uplinked their service onto the satellite.)

The third instance of the entry of unlicensed networks is more recent. On April 2, 1984, the Commission authorized a large number of U.S. satellite services to extend their networks into Canada, by contracting with Canadian cable systems to carry their services into cable homes in Canada.[11] However, none of these services were required to obtain a network licence. The current list of U.S. satellite services authorized for carriage by cable systems in Canada, as revised on June 11, 1984, is as follows:

Cable News Network (CNN)
CNN Headline News
The Nashville Network (TNN)
The Arts and Entertainment Network
Financial News Network
The Weather Channel
The Learning Channel
Biznet, The American Business Network
Country Music Television
Cable Satellite Public Affairs Network (C-Span)
The Silent Network
The Professional Education Network (PEN)
AP Newscable
Dow Jones Cable News
Reuters News View
United Press International Custom Cable

More recently, the Commission has added certain U.S. superstations to the authorized list, in respect to carriage by cable systems in remote areas.[12] There has been continued pressure by the cable industry to make it possible to carry these U.S. superstations in urban markets as well.

While the application of the Broadcasting Act to satellite-to-cable services is confused and would benefit from clarification, this is not the real reason why the Commission has declined to require these services to obtain a network licence for their operations in Canada. Rather, there appear to be three reasons for its approach.

First, in the case of the Knowledge Network, the service was inaugurated prior to the Shellbird decision and during a time when the B.C. government was actively challenging CRTC authority in the courts. (The case has since been indefinitely adjourned by mutual consent.)[13] The Commission would prefer to issue a network licence to Knowledge Authority to regularize its operation but in the absence of a formal application, it has been reluctant to press the issue.

In the case of the S.E.T.T.E. service and that of the U.S. satellite services, there is a more compelling reason why the CRTC has not required them to obtain a network licence. Under the Direction on Canadian Ownership issued to the CRTC in 1969 under Section 27 of the Broadcasting Act, the Commission is prohibited from granting a network licence to a foreign-owned or controlled undertaking. Even if the services had been owned and controlled by Canadians, the Commission would have found it difficult to justify granting a network licence to such services in the face of the requirement in Section 3 of the Broadcasting Act that programming should use predominantly Canadian creative and other resources. The S.E.T.T.E. service is entirely made up of programming from France and the U.S. satellite services have little or no Canadian content. Knowing the services could never qualify for a network licence but wanting them imported anyway, the Commission resolved the problem by deciding that a network licence would not be required.

A third reason why the Commission has refrained from requiring a network licence to be obtained -- at least in the case of the U.S. services -- has undoubtedly been a desire to minimize the amount of regulation involved. By simply issuing a list of authorized U.S. services, the Commission has avoided the necessity of requiring any of the satellite services to appear at a hearing to describe their service, explain why they wish to extend their network into Canada, present alternative proposals, disclose their program schedules, or to commit to any Canadian content requirements. These requirements are inherent in the process of obtaining a network licence and had to be met by the successful applicants for Canadian pay television or specialty service network operations. However, by declining to require that the U.S. services be subject to a network licence, the CRTC has allowed such services to have the benefits of network operation in Canada, without any of the responsibilities of a network licensee.

The Rationale for Network Licensing

Obviously it is important for the Commission to be able to act expeditiously when presented with a requirement for urgent action. However, it may be appropriate to step back for a moment and examine the implications of the Commission's approach for the long-range structure of the Canadian broadcasting system.

If the Task Force wishes to focus on the need for Canadian control over the broadcasting system, one approach that might be considered would be to require all satellite program services authorized for reception and distribution in Canada to be licensed as network operations by the CRTC. Where practicable, such operations would be owned and controlled by Canadian firms. Obviously, where for reasons of expediency this is not practical,

however, the foreign based operations could be made subject to conditions of licence requiring that their operations be carried on in Canada with Canadian partners, with the ultimate goal of having a Canadian version of their service supplanting the foreign service in whole or in part.

In exploring this approach, close attention must be given to the nature of satellite services and their operation. Whether or not such a service originates in Canada or the United States, it operates in much the same fashion. The program service supplier will assemble a package of programming, paying for the right to distribute such programming to cable subscribers in a specified geographical area. The package is uplinked from an origination centre to a satellite in geostationary orbit over the equator. The signal is then received directly from the satellite by cable operators who have entered into an affiliation contract with the program supplier authorizing them to distribute the service to their subscribers. The affiliation agreement typically grants the cable operator the right to transmit the programming, and requires the cable operator to use its best efforts to market the service effectively. In addition, the agreements typically require the cable operator to remit a payment per subscriber per month to the program supplier, and in cases where the service is advertiser-supported, to carry the advertisements to subscribers without alteration or deletion. In the U.S. environment, program suppliers may also permit cable affiliates to insert local advertising in spots made available for that purpose.

The importation of U.S. satellite services presents a substantial policy question for Canadian sovereignty. By affiliating themselves with Canadian cable systems, U.S. program services have extended their networks into Canada as surely as if they had an affiliated station in Canada. In addition, unlike U.S. border stations, U.S. satellite services clear the contractual rights for their programming for Canada, and receive monies directly from their cable affiliates in Canada. For functional purposes, their operations are carried on in exactly the same way as Canadian pay television or specialty services are operated in this country.

There are a number of reasons why as a matter of public policy it might be appropriate to require that satellite services authorized for distribution in Canada obtain a network licence from the CRTC.

The first and foremost reason is the issue of Canadian control. The principle that broadcasting stations and networks in each country should be owned and controlled by the nationals of that country is a principle that is well recognized on both sides of the Canada-U.S. border. In the United States, this policy is reflected in Section 310 of the Communications Act of 1934 which

prohibits the Federal Communications Commission from granting a radio licence to any alien, foreign government, foreign corporation, or any corporation of which any officer or director is an alien or of which more than 20% of the capital is owned by aliens.

In Canada, the same policy has been implemented through the issuances of cabinet directions on eligibility criteria under Section 27 of the Broadcasting Act. The Direction on Canadian Ownership was first issued in 1969 and a number of broadcasting undertakings which were at that time owned by foreign interests were required to be divested by the time of the next renewal of their licence. In the early 1970's, broadcasting holdings with an estimated value of $150 million were divested to Canadian interests. The result of this important step was to repatriate to Canada, control over the ownership of broadcasting undertakings located in whole or in part in Canada.[14]

The extension of foreign broadcasting networks through affiliation agreements with Canadian radio or television stations has also been prohibited for many years in Canada. In 1960, following the licensing of second television stations in major markets of Canada, the Board of Broadcast Governors introduced regulations which among other matters prohibited any television stations from entering into an affiliation agreement with a non-Canadian network operator: see SOR/60-470. These regulations were extended to AM and FM radio stations in 1961: see SOR/61-486. These regulations continue to be in force.

The principle upon which such regulations are based is simple. By definition, a network operator is responsible for the acquisition, selection and scheduling of program content. Foreign programs are not prohibited; in fact, the best of non-Canadian programs are welcomed in Canada. However, the theory behind the U.S. prohibition of networks in Canada, is that the acquisition, selection and scheduling of foreign programs should be in the hands of Canadians.

The introduction of satellite services into Canada raises the same issues in a different technological form. However, the fact that the signals originate from a geostationary satellite orbiting the equator, rather than from a local transmitter, should not obscure the implications of permitting U.S. assembled and controlled services to extend their network operations into Canada, whether directly by DBS, or indirectly through affiliation contracts with cable television systems.

Certain of the adverse implications of wholesale importation are well known, and hardly require mention. Since the services contain little or no Canadian content, their entry into Canada is unfair to Canadian services which must, as a condition

of obtaining a broadcasting licence, commit substantial resources toward Canadian production. Simply put, American broadcasting is based on a laissez faire marketplace environment, with steadily decreasing regulatory requirements. Canadian broadcasting, by contrast, continues to be subject to a wide number of public policy objectives which are central to the existence of the nation, let alone the broadcasting system.

In addition to the question of unfair competition, however, the introduction of U.S. services into Canada raises an even more important policy concern which must be addressed -- namely, the North-Americanization of program rights. Once a U.S. distributor is permitted to freely enter Canada with a U.S. product, that distributor will find it in its interest to acquire both Canadian and U.S. rights to all its programming. This is antithetical to the interests of Canadian program producers and distributors who must be able to treat the Canadian market as a distinct and separate entity from the U.S. and foreign markets in order to finance indigenous production.

To give an example of the phenomenon in its most obvious form, let us suppose that a U.S. broadcasting network were permitted to extend its network throughout Canada with affiliated stations. (This is presently prohibited by sub-section 23(4)(a) of the Television Broadcasting Regulations.)

Under these circumstances, the U.S. network would acquire Canadian rights for all its broadcast programming from its program suppliers. None of that programming could then be sold to CBC or CTV in Canada; it would exclusively be seen on the various affiliated stations of the U.S. network in Canada. Thus, popular programming upon which Canadian networks depend to generate a profit to sustain their Canadian production would no longer be available to them.

The problems would be compounded for a Canadian television producer. Let us suppose that a Canadian television producer were interested in developing indigenous Canadian production for sale first to Canada and then to foreign markets. If that producer wanted access to the Canadian market, he or she would need to go to a foreign network programming to foreign tastes and try to seek access to Canadians through that network. If, on the other hand, the producer sold his or her product to a Canadian network, thus obtaining Canadian access, the producer would in most cases be precluded from making a sale to the foreign network because that network would insist on acquiring Canadian rights for its stations in Canada at the same time.

In short, the best interests for Canadian program production and for the autonomy of the Canadian broadcasting system is to maximize the differentiation of the Canadian and U.S.

markets for the purpose of program licensing. The entry of U.S. satellite services destroys the autonomy of the Canadian market and introduces a North American market for the first time in television licensing. As such, such entry could have profound implications for the continuance of an autonomous Canadian broadcasting system.

It is sometimes tempting to embrace the North American market concept, since some producers might consider that it would enhance their access to the U.S. market. But what is at issue in this debate is access to the Canadian market. For the above structural reasons, the introduction of any North American service can be antithetical to the development of indigenous Canadian programming of unique interest to Canadians, because any "North American" service will necessarily need to be programmed for the interests of the overwhelming majority of its audience, which will be located south of the border.

The penetration of the U.S. satellite services in Canada has been relatively limited to date by virtue of the requirement that such services can only be offered on a discretionary basis, i.e. as part of a package of pay television and/or specialty channels for an additional price above the price of basic cable service. The five most popular U.S. services are reported to have achieved the following penetration by December 31, 1985:[15]

	Number of Canadian Households
Cable News Network (CNN)	292,266
Arts & Entertainment	284,675
The Nashville Network	264,953
Financial News Network (FNN)	159,471
CNN Headline News	158,595
The Learning Channel	61,035

These numbers sound low, until it is realized that Cable News Network already has more subscribers than the number of total cable homes in either Saskatchewan or Manitoba.

The Commission has not authorized any U.S. services for distribution in Canada whose program content would overlap with or be competitive with existing Canadian satellite services. So, for example, none of the movie-based U.S. services -- Home Box Office, Cinemax, Showtime, The Movie Channel, and others -- have been permitted to be carried by Canadian cable systems, even if such services had obtained Canadian rights to the films they distribute, which they have not. Similarly, neither MTV, the U.S. rock music channel, nor ESPN, the U.S. sports service, have been permitted to be distributed in Canada.[16]

In each of these program areas -- movies, music and sports -- Canadians are presently served by Canadian satellite services which select, acquire, schedule and uplink their programs entirely from Canada. This does not deprive Canadians of popular foreign programs. For example, virtually all the major Hollywood films are available through the First Choice*Superchannel or Super Ecran services, at a retail price not dissimilar from the U.S. pay services if the exchange rate is taken into account. Unlike the U.S. services, however, the Canadian pay services are required under their CRTC network licence to develop, acquire, and schedule Canadian productions as well.

The hard experience of the last three years has demonstrated that the Canadian market is not large enough to support competing Canadian pay services and still provide a meaningful contribution to Canadian content. The economics of pay television are such that the Canadian content contribution of the licensees must in the end be a direct function of their revenues, which depend in turn on market size and penetration. Thus, if U.S. pay services -- without any obligation to support Canadian content -- were permitted to siphon off a part of the Canadian market, the result would be unfair to the Canadian network licensees, to the Canadian program production industry, to Canadian viewers who wish to see Canadian as well as foreign programming, and to the objectives of the Broadcasting Act.

This is the underlying rationale for the Commission's cable carriage policies insofar as they limit the distribution of competing U.S. satellite services. There may also be room for development of Canadian counterpart services to other U.S. services. For example, there may be room for a Canadian family or children's television service, and applications for such services have already been received by the CRTC.[17]

In addition, there may well be room for Canadian satellite services to develop in the areas of news, country music, and performing arts. In these program genres, however, as we have seen, the Commission has already permitted the distribution of U.S. satellite services. Thus, efforts to launch services of this kind in Canada would be prejudiced. First, the existing U.S. service would siphon off part of the market needed to sustain a viable Canadian service. Second, to the extent the U.S. services contain foreign programming that would be appropriate for inclusion in a Canadian counterpart service, the U.S. service would find it in its interest to decline to license such programs for use by the Canadian service if the U.S. service was already able to distribute such programming directly to Canadians.

Options for Consideration

Obviously, the future evolution of satellite services depends on many technological and market forces which cannot now be predicted. However, it is essential that the CRTC be given the tools to encourage the development of indigenous Canadian satellite services in the program areas so far undeveloped, and a clear mandate to achieve that goal. The following options might be considered in this connection:

1. The Governor in Council could issue a new Direction on Canadian Ownership which would allow, as a limited case exception, the issuance of a network licence to a non-Canadian network operator of a satellite service, subject to the transitional provisions noted further below.

2. The present authorizations granted by the Commission to cable systems for the carriage of individual U.S. satellite service could be frozen and no new authorizations granted. At the time of renewal of each cable licence, the present authorizations could be rescinded and replaced with an authorization to carry all satellite services, including U.S. services, that have obtained a CRTC network licence to serve the area in question.

3. Interested U.S. satellite services which wish to extend their network operations into Canada could be invited to apply for a network licence, preferably through a Canadian partner responsible for the operations in Canada. Such licences might be granted only when the content of the U.S. service would not overlap with or be competitive with a present or proposed Canadian satellite service.

4. U.S. satellite services that are granted network licences in Canada could be encouraged to seek an equitable licensing arrangement with an appropriate Canadian partner with a view to eventually launching a Canadian counterpart service to replace the U.S. service in whole or in part insofar as Canadian coverage is concerned.

5. Network licences issued to non-Canadian satellite services could be subject to appropriate licence conditions and linkage requirements. In addition, such licenses could be subject to a condition that the licence shall terminate upon the licensing and launch of a Canadian-owned service covering the same program area.

The foregoing options rely heavily on the use of network licensing, rather than a continuance of the present regulatory practice of simply granting authorizations for cable carriage without a public notice or hearing. While the process of network licensing is more involved, it alone provides the Commission with

the ability to monitor changing circumstances, to seek and obtain relevant information from program suppliers, and to annex appropriate licence conditions on the network operation rather than cumbersomely through the authorization process, which is directed to the cable affiliates, not to the persons who are responsible for the programming.

To give an example, the Commission has imposed conditions in regard to the S.E.T.T.E. service requiring conventional television broadcasters in Canada to be given three months to exercise an option to purchase the programs for broadcast use in Canada. Lacking the mechanism of a network licence, the Commission made this a condition of the licence of the cable systems authorized to carry the S.E.T.T.E. service.[18] Obviously it would be much more practical to impose this as a condition of a licence issued to S.E.T.T.E. itself, since it is the latter company that should be looked to to carry out this obligation.

Consequential Amendments to the Broadcasting Act

It is important to note that the foregoing options could be taken without amending the Broadcasting Act. However, it would clearly be useful to clarify many of the existing terms in the Act and ensure that the Act applies to new technological advances.

The following amendments to the Broadcasting Act could be considered in this connection:

1. As proposed in Bill C-20, the term "undertaking" could be defined so as to clearly extend to SMATV systems. These systems could continue to be exempted from licensing by the Commission but this would ensure that the rules for the reception and distribution of satellite services would be the same for both cable television and SMATV systems.

2. The term "broadcasting" could be defined so as to clearly extend to services that are intended for retransmission by cable television systems to subscribers, even if the signals are intended for direct reception by the general public. This would be consistent with the ITU International Radio Regulations, which were amended in 1971 to state that in regard to broadcasting from satellites, the term "direct reception" encompasses both individual reception and community reception, the latter term being itself defined to include local cable television systems. This approach could also be used in the Canadian legislation.

3. The Broadcasting Act could also be amended to make it clear that nothing turns on whether or not a signal is scrambled in determining whether the signal is "broadcasting". While scrambled signals are intended only for reception by authorized (i.e. paying) members of the public, they are nevertheless

intended for reception by the public. To suggest otherwise would be the same as suggesting that a theatre would not be carrying on a public performance if it limited its audience to those members of the public who purchased a ticket. Although the issue is now being reconsidered, this approach has also been adopted in the past by the FCC in the United States in regard to subscription television (STV) stations, which have been classified as "broadcasting" even though their signals are coded.[19]

4. Finally, the term "network" could be clarified to make it clear that a network is being carried on in whole or part in Canada if the program supplier has affiliation contracts with persons located in Canada, or if the supplier delivers the network service on a contracted basis to persons located in Canada, whether directly or through intermediaries.

Peter S. Grant

March 31, 1986.

Footnotes

1. See R. v. Maahs and Teleprompter Cable Communications Corp. (1975), 20 C.P.R. (2d) 117.

2. R. v. Acadian Telecommunications Co. Ltd. (N.B. Prov. Ct., Caughey, P.C.J., May 15, 1970); R. v. Acadian Cable T.V. Ltd. et al (N.B. Prov. Ct., Rice, P.C.J., July 12 and August 14, 1973).

3. Bill C-20, clause 7, introduced for first reading on December 20, 1984.

4. See Mutual Broadcasting Limited, Télémedia Communications Ltée, 6 C.R.T. 138 (Decisions CRTC 80-421, 80-422, July 8, 1980).

5. Distribution of the House of Commons Proceedings by Satellite, 6 C.R.T. (Part 2) 1 (CRTC Public Announcement, April 1, 1980).

6. CTV Television Network Ltd., 7 C.R.T. 33 (Decision CRTC 81-262, April 14, 1981).

7. Canadian Satellite Communications Inc., 7 C.R.T. 20 (Decision CRTC 81-252, April 14, 1981). For the addition of the 3 + 1 U.S. signals, see 8 C.R.T. 749 (Decision CRTC 83-126, March 8, 1983).

8. Lount Corporation v. Attorney General of Canada (1985), 19 D.L.R. (4th) 304.

9. Carriage of Television Programming From France, 6 C.R.T. 372 (Decision CRTC 80-635, September 22, 1980). See also 5 C.R.T. 462.

10. Alberta Educational Communications Corporation, 10 C.R.T. 629 (Decision CRTC 84-956, November 15, 1984).

11. Specialty Programming Services (Public Notice CRTC 1984-81, April 2, 1984).

12. Optional Canadian and Non-Canadian Satellite Services (Public Notice CRTC 1985-72, April 4, 1985).

13. A.G.-B.C. v. A.G.-Canada (action adjourned indefinitely in 1983).

14. CRTC, Canadian Ownership in Broadcasting, A Report on the Foreign Divestiture Process (1974).

15. Cable Communiqué, January, 1986. (Mediastats Inc.).

16. Specialty Programming Services (Public Notice CRTC 1984-81, April 2, 1984) at p. 13.

17. See CRTC Notice of Public Hearing 1985-6, January 29, 1985; Public Notice 1985-155, July 22, 1985.

18. Supra, note 9.

19. For the original FCC regulatory treatment of subscription television (STV), see Further Notice of Proposed Rulemaking and Notice of Inquiry on Subscription Television, (1966) 3 F.C.C. 2d ,1 at 9. For a review of the authorities and the FCC's current view on this matter: Notice of Proposed Rulemaking, General Docket 85-305, (Subscription Video Services), FCC 85-538, released January 8, 1986.